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Senate

The Senate met at 11 a.m., and was called to order by the President pro tempore [Mr. THURMOND].

The PRESIDENT pro tempore. The Chaplain will now deliver the opening prayer.

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Let us pray:

Almighty God, Sovereign of this land, Lord of our personal lives, and source of unity in the midst of diversity, enable us to show the true nature of loyalty to our Nation, the Office of the President, the Constitution, and our future. Help us to exemplify how to communicate convictions without censure of those who may not fully agree with us. Keep us from almighty tone and tenor. Free us from the false assumption that we ever have a corner on all the truth. Unsettle any pious posturing that pretends that we alone can speak for You.

You created us in Your image. Help us never to return the compliment. Break the cycle of judgment, categorization, and condemnation so prevalent in our land. Forgive us when we presume Your authority by setting up ourselves as judges of the worth of those who disagree with us.

At the same time, Lord, we know that You have not called us to flabby indulgence when it comes to seeking truth. Nor do You encourage us to buy into our age of appeasement and tolerance where everything is relative and there are no absolutes. What You do ask is that we humbly seek what is Your best for our Nation and work to achieve that together. To this goal we commit this day. In Your powerful name. Amen.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The acting majority leader is recognized.

RESERVATION OF LEADER TIME

Mr. LOTT. Thank you, Mr. President. This morning the leader time has been reserved.

SCHEDULE

Mr. LOTT. Mr. President, at 12 noon today, we will resume consideration of H.R. 956, the product liability bill. There will be no rollcall votes during the session today. However, under the unanimous-consent agreement, all medical malpractice amendments to the product liability bill must be offered and debated today. Any votes ordered on those amendments will be stacked to begin at 11 a.m. on Tuesday.

MEASURE READ THE SECOND TIME—S. 735

Mr. LOTT. Mr. President, I understand there is a bill at the desk that is due to be read for a second time.

The PRESIDENT pro tempore. The clerk will read the bill for the second time.

The bill was read for the second time.

Mr. LOTT. Mr. President, I object to any further proceedings on this matter at this time.

The PRESIDENT pro tempore. The bill will be placed on the calendar.

MORNING BUSINESS

The PRESIDENT pro tempore. There will now be a period for the transaction of morning business not to extend beyond the hour of 12 noon with Senators permitted to speak for up to 5 minutes each.

Mr. LOTT. Mr. President, observing that no Senator is seeking to speak at

this particular moment, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. DEWINE). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. THOMAS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Wyoming is recognized.

Mr. THOMAS. I thank the Chair.

(The remarks of Mr. THOMAS pertaining to the introduction of S. 738 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

MEDICAL MALPRACTICE AMENDMENT

Mr. KYL. Mr. President, I would like to address for a few minutes the legislation which will be pending very shortly today, and specifically the amendment relating to medical malpractice that is before Members.

I speak, of course, of the legislation to reform our product liability tort system and the amendment which would also reform the medical malpractice component of that civil tort litigation system.

Some have said that we have, in effect, a tort tax in this country, a tax on all citizens by virtue of the increased costs of the products and the services, and in particular, I am speaking of medical services, that result from the fact that our tort system has become very expensive.

The costs of operating that system have had to be folded into the costs of the products and the costs of the services in order to pay for the liability insurance, the lawyers' fees and the other expenses that fund this tort system of ours. That tort tax ends up being a tax on all Americans.

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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S 5857

In the Los Angeles Times, Thursday, April 27, Majority Leader BOB DOLE wrote an article, and it was published on this date, the title of which is "Ignore the Lawyers, Help the People."

Mr. President, I ask unanimous consent that this article be printed at the conclusion of my remarks this morning.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. KYL. Mr. President, in this article, the majority leader, I think, makes a very powerful point; among them, points that are in support of the amendment that is currently pending before the Senate, which I offered on Thursday afternoon, an amendment which would put some reasonable caps on attorney's fees.

As the majority leader notes in this article, the people who suffer the most from our current litigation system are, as he puts it, the little guy. He quotes a survey from the National Federation of Independent Business in a couple of States, Texas and Tennessee, which found that one-third to one-half of small businesses have been either sued or been threatened with suit to punitive damages.

Because of this kind of lawsuit abuse, the majority leader notes that the Girl Scout Council, for example, in Washington, must sell 87,000 boxes of cookies each year just to pay for liability insurance. The average Little League's liability insurance jumped 1,000 percent in a recent 5-year period.

Just a couple of examples of the fact that we are all paying the costs of this litigation system, the tort taxes, if you will.

If you are a woman and you need to go see your OB/GYN on January 2, be aware that on January 1, before that physician can even open the doors to see anyone, that physician is going to be paying medical malpractice premiums of probably a minimum of \$30,000 and in many cases far more than that.

Neurosurgeons are up in the \$60-\$70,000 range or higher. In other words, before most physicians can even begin to treat us, at the beginning of the year, they have had to shell out in medical malpractice premium costs more money than most Americans make in a year.

The cost of those premiums is—just as the cost of the liability insurance premiums paid for by the Girl Scouts or the Boy Scouts or other organizations—the cost of those premiums is borne by everyone of us in the products that we buy, in the services that we receive.

The majority leader goes on to point out in this article that there are three myths, all of which get to the basic point that the person who suffers is the little guy, as he noted. And the persons who make out in this litigation lottery are the lawyers. I must say at the outset, I practiced law for 20 years and I have a deep and abiding respect both

for my fellow lawyers and for our legal system. But in the past, where there have been changes that have required action to compensate, where it has gotten out of balance, the legal profession has been pretty well able to restore balance to the system. That has not been possible with respect to this litigation lottery. You have a large group of lawyers who make their living by charging contingency fees to clients and then recovering very large—sometimes enormously large—sums of money as a result of the cases that they settle or that they bring to trial.

One of the myths that the majority leader notes is that the trial lawyers protect the consumers. But the fact of the matter is that over half of the money recovered by the plaintiffs in these cases goes to the lawyers. As a matter of fact, let me cite—this is not just one or two studies. There are several different studies that make this point. For example, one of the studies was done by the Department of Commerce just last year, a 1994 study, which stated that 40 cents of each dollar expended in litigation is paid in attorney's fees.

On a recent edition of ABC's "20/20," John Stossel reported that some trial lawyers are earning contingency fees that pay them the equivalent of \$300,000 an hour. Think of that, Mr. President, \$300,000 an hour. So this is not a matter of lawyers being properly compensated for taking cases. This is literally a matter of hitting the jackpot. It is not plaintiff who hits the jackpot, it is plaintiff's lawyer.

A 1994 study by the Hudson Institute found that 50 cents out of each litigation dollar went to attorney's fees. That, by the way, was reported on in the June 1994 article in the Wall Street Journal.

A study of the Rand Corporation also found that 50 cents out of each liability dollar goes to lawyers and transaction costs, rather than to injured victims. There are others.

The point I am making here is that study after study after study has made the point that about half of all of the recoveries go to the lawyers. That is not fair to the victims. That is not fair to the plaintiffs. And what the amendment which I have offered and is currently pending before us will do is to ensure that the victim, the claimant, plaintiff recovers his or her fair share of whatever recovery is obtained. Effectively, that means something in the order of 75 percent of it. I think most Americans would find it astonishing that we would even be having a debate about whether or not the person who is injured, who actually suffers, should be receiving on the order of 75 percent of what the jury has awarded to that individual. Yet that is what this is all about. Our amendment simply limits the attorney's fees to approximately 25 percent of the recovery.

I also note, when we talk about this first myth that the majority leader noted that the trial lawyers are just

protecting consumers, one other example of the costs that get passed on. The American Tort Reform Association notes that half of the cost of a \$200 football helmet goes to lawsuit-driven liability insurance. This is just one example of products in our society which have been the subject of these suits and which, therefore, are either not on the market or are on the market at a greatly increased cost, simply because of the litigation lottery.

Myth No. 2, trial lawyers protect workers and the poor. But as the majority leader notes in his article, the current system victimizes no group more than the working poor and disadvantaged. Lawsuits add a \$1,200 litigation tax on every consumer in America. That is the cost we are all paying as a result of this litigation lottery. The trial lawyers, through contingency fees, as I said, can effectively earn \$300,000 an hour in some cases. So I do not think it is true to say that trial lawyers protect workers, just workers and the poor.

Myth No. 3 that the majority leader points out is that the trial lawyers are the champions of safety; if they did not bring these lawsuits that, somehow, very dangerous products would still be on the market. There is some truth to the fact that high profile cases have helped to remove unsafe products from the market. But that exception to the rule should not be the basis for this lottery, this jackpot which results when people find they can recover astronomical sums for some perceived damage. It often, in fact, makes our lives less safe rather than more safe. One only has to look at the drugs that do not reach the market because the pharmaceutical companies are afraid if they produce some new drug without 30 years of testing on people that somebody might have an adverse reaction to it, sue the drug manufacturer, and make millions in punitive damages.

It is not just drugs. It is also designs of all kinds of new products which manufacturers have said over and over again they are reluctant to change because, if they do, there will then be the inevitable lawsuit that that change resulted in some harm to someone as a result of which there will be a new lawsuit.

All three myths, I think, need to be exploded. The bottom line of all three, as I said in the beginning, is that the lawyers are using this process not so much to create safety or protect the little guy—the little guy is the person who is actually hurt—but rather to earn a living which is far beyond what is necessary to protect the public. And that then gets to the amendment I have introduced and that is before us right now.

Very briefly, my amendment will be actually criticized as being too generous to the trial lawyers because we start with the premise that the underlying legislation, the McConnell-Kassebaum-Lieberman amendment, already

provides for lawyer's fees for the economic damages suffered. So a lawyer can recover either 33 percent of the first \$150,000 and 25 percent of everything thereafter with no limit for the economic damages. So you can have a very large attorney fee just for the economic damage component of a lawsuit.

Then you have the noneconomic damage component. This is the pain and suffering that is supposed to go to the person who suffered the pain and suffering. All we say in my amendment is that the lawyer would be entitled to no more than 25 percent of the first \$250,000 of that pain and suffering. So that is an additional up to \$60,000-plus in attorney's fees for the pain and suffering component of the suit.

Then, if it is a suit in which punitive damages are sought and the lawyer believes that he should be entitled to a percentage of that as well, he may petition the court to have a percentage of the punitive damage award. The court would have to make that award based on what is reasonable and ethical. It should be based upon the amount of time the attorney put in; 25 percent would be presumed to be a reasonable fee but all of this is up to the court.

So you see, this is a limitation but it is a limitation which will enable attorneys to receive multithousands and tens of thousands and even hundreds of thousands of dollars in fees for the kind of case that would warrant it. So there is no question there would be an incentive for anybody who has a claim—be it a little claim or a larger claim—to have that case brought to trial because a lawyer would have an incentive to do so. But what it provides is a cap so the lawyer does not have a lottery here, so the lawyer does not have an incentive to bring these cases just to see if that lawyer can hit the jackpot and earn literally hundreds and hundreds of thousands of dollars or millions of dollars in attorney's fees when we think that money should go to the plaintiff or the claimant, the victim in the case. That is what it is all about. We are going to be voting on that shortly after 11 o'clock tomorrow morning.

I just urge all of my colleagues to view this issue in the light of what is best for the claimant, for the plaintiff, the injured party, and to view it in the light of what is best for the American people, who are paying a very large sum of money so that a lot of lawyers can get very rich. As I say, some people criticize this as not being tough enough on the lawyers. That is not what we are here for. We are not here to bash lawyers, but to put a cap on the big bonanza kind of recovery that we have all been reading about.

Finally, I want to take a minute to say that at shortly after noon, I will be offering a second amendment. This is an amendment which will put a cap on the noneconomic damages—so-called pain and suffering—in these medical malpractice cases. It will put a cap of

\$500,000 on these medical malpractice cases.

A lot of our colleagues have said the cap discussed earlier—a quarter of a million dollars—is just not quite big enough for that really exceptional case. In response to that, I think a lot of people have said, "OK. We will provide for up to half a million dollars." Bear in mind that this is after the economic damages—after all of the bills have been paid, after all of the economic losses have been accounted for—there is the pain and suffering part of it. It does not relate to the punitive damages. There will be a different kind of treatment for that. This is just to say with respect to that noneconomic damage component, there will be a cap of half a million dollars.

So I will be proposing that amendment and asking support from my colleagues for that amendment, as well.

Mr. President, I yield the floor.

EXHIBIT 1

[From the Los Angeles Times, Apr. 27, 1995]

IGNORE THE LAWYERS, HELP THE PEOPLE

(By Bob Dole)

During the current Senate debate over legal reform, you will hear from the trial lawyers and their allies that legal reform is nothing more than a boost to big business.

But the facts suggest otherwise. Who is hurt by lawsuit abuse? It's the little guy, according to recent surveys by the National Federation of Independent Businesses in Texas and Tennessee, which found that one-third to one-half of small businesses have been sued or been threatened with suit for punitive damages. Because of this kind of lawsuit abuse, the Washington-area Girl Scout council must sell 87,000 boxes of cookies each year just to pay for liability insurance, and the average local Little League's liability insurance jumped 1,000% in a recent five-year period. These are just a few examples of a problem that is big and getting bigger.

Who profits from lawsuit abuse? The trial lawyers.

As the Senate considers legislation to reform lawsuit abuses, the buzzing sound you hear is the trial lawyers swarming to the defense of their hive of honey: The lawsuit lottery.

This picture, needless to say, is not the one trial lawyers would paint. According to them, they are the best (perhaps only) friends of the poor, consumers and women. They have one of the most effective public-relations efforts going. It is a costly exercise, characterized by millions in contributions to politicians and judges. Now they are mounting a \$20-million campaign to stop lawsuit reform in the U.S. Senate.

Why? Lost in the fog of propaganda is a fact well-understood by most Americans: Our legal system costs too much for everybody (except the trial lawyers) and has turned into a lottery where even the threat of outrageous damages with little or no connection to fault extorts money and time from charitable organizations, small businesses, blood banks and volunteer groups. But, like any effective gambling operation, the house always wins. And the house in this case is the trial lawyers and the system they so ardently defend.

We need a system that ensures that those harmed by someone else's wrongful conduct are compensated fully. And we need to ensure that the system is not twisted in ways that deter folks from engaging in activities

that we ought to encourage. That's why I have offered an amendment that would extend the protections against outrageous punitive damages now being considered for manufacturers to include volunteer and charitable organizations, small businesses and local governments.

These reforms are an attempt to restore fairness and integrity to a system that has gone awry. But, given the distortions from the trial-lawyer lobby, it is clearly time to confront a few of their most cherished myths.

Myth No. 1: Trial lawyers protect consumers. The California Trial Lawyers Assn. recently changed its name to the Consumer Attorneys of California. Some consumer Attorneys of California. Some consumer champions. Across the nation, abusive lawsuits drive up the costs of all kinds of goods. As noted by the American Tort Reform Assn., half of the cost of a \$200 football helmet goes to lawsuit-driven liability insurance.

Myth No. 2: Trial lawyers protect workers and the poor. The current system victimizes no group more than the working poor and the disadvantaged. Lawsuit add a \$1,200 litigation tax on every consumer in America.

Meanwhile, some trial lawyers through contingency fees effectively earn \$300,000 per hour.

The poor also pay in jobs. A RAND Corp. study estimates that wrongful termination suits have reduced the hiring levels in just one state by as many as 650,000 jobs.

Myth No. 3: Trial lawyers are champions of safety. Personal injury lawyers put out literature informing us that Americans live in the safest society in the world because of our civil justice system. The reality is that our legal system long ago crossed a critical threshold: It often makes our daily lives less safe. Lawsuits not only stop pharmaceutical research and new drugs. They cause industrial engineers to avoid safety improvements for fear that current designs, by comparison, will be interpreted as defective. They make all organizations fearful of the new—because in the hands of personal injury lawyers, "new and improved" has come to mean "new and open season for lawsuits."

Part of our heritage as a free people is a legal system where justice, not the search for a windfall, is the goal. Over the past 40 years, we have strayed from that path. The powerful trial-lawyer lobby must not be allowed to kill reform with a campaign of disinformation, distortion and delay. I am determined that this is the year that civil-justice reform will pass the Senate.

Mr. GRAMS addressed the Chair.

The PRESIDING OFFICER. Under the previous order, the Senator from Minnesota [Mr. GRAMS] is recognized to speak for up to 15 minutes.

The Senator from Minnesota is recognized.

Mr. GRAMS. Thank you very much, Mr. President.

PRODUCT LIABILITY AND MEDICAL MALPRACTICE REFORM

Mr. GRAMS. Mr. President, I think most Senators would agree that health care reform was the most important piece of legislation we debated during the 103d Congress.

Throughout the health care debate, we heard from people here in Washington and across the Nation, and we learned what they valued most about our Nation's health care system. We